IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 163 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISMAIL MAHMAD SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 163 of 1999
MR PM VYAS for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
Mr K C Shah, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH
and
MR.JUSTICE H.H.MEHTA

Date of decision: 23/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an appeal under section 374 of the Code of Criminal Procedure, 1973 challenging the judgment and conviction order dated 24.12.1998 recorded by the learned Addl.Sessions Judge, Valsad District camping at Valsad, in Special Case No.7/96 under which the learned trial Judge convicted the present appellant for offence punishable under section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced him to suffer R.I. for 12 years and directed payment of fine of Rupees One Lac. In default of payment of fine, the appellant was directed to undergo further imprisonment for one year. The facts of the case of the prosecution before the trial court may be briefly stated as follows:

2. Police Inspector, State Narcotic Cell, CID (Crime), Gujarat State, Ahmedabad, Mr N A Pathan is the informant and he had received an information that a person was selling narcotic drugs behind the railway cabin of Raichand Road at Navsari on 15.2.1996. Therefore, the said informant reduced the said information into writing and forwarded the same to Dy.Superintendent of Police. Thereafter, he called panchas and in the company of other police officers, went to the spot described as above. There it was found that right near the railway cabin, there was an electric pole being Pole No.320(K) and the present appellant was found sitting there by the side of the said electric pole. As soon as the police party reached the said spot, Mr Pathan introduced himself and stated to the appellant that as per the information received by him, the appellant was selling narcotic drug and, therefore, he was required to be searched. Mr Pathan also informed him that if he wanted to be searched in presence of a Gazetted Officer or a Magistrate, then appropriate arrangement would be made. However, the appellant agreed to be searched by Mr Pathan without the requirement of attendance of those officers. Therefore, the personal search of the appellant was carried out and it was noticed that 330 grams of charas was found from the person of the appellant. Same way, on personal search, an amount of Rs.350/- was also found from the person of the appellant. Panchnama was drawn, muddamal article was seized, FIR was filed and crime was registered, investigation was undertaken and charge sheet was filed and on receipt of the charge sheet, it was registered as Special Case No.7/96.

3. The learned trial Judge framed charge at Exh.1 on 11.4.1997 for the aforesaid offence against the appellant. It was read over and explained to the appellant. He pleaded not guilty and, therefore, evidence was recorded and at the conclusion of the trial, further statement of the appellant was recorded. After hearing the arguments, the learned Judge found the appellant guilty for the aforesaid offence. He was heard on the point of quantum of punishment and thereafter punishment was inflicted on the appellant has aforesaid. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant had preferred this appeal before this court. It has been contended that the trial court has overlooked the fact that the provisions contained in section 50 have not been complied with. It has further been contended that even provisions contained in sections 41 and 42 have also not been complied with. It is also stated by the appellant that the panch witnesses were known to the police and, therefore, their evidence could not have been relied upon by the trial court. That on the whole, the judgment and conviction order recorded by the trial court are illegal and erroneous and deserve to be set aside. The appellant, therefore, prays that the present appeal be allowed, the judgment and conviction order be set aside and the appellant be held to be not guilty and be acquitted of the aforesaid offence.

4. On receipt of the appeal, it was ordered to be admitted. Thereafter, the appeal has come up for final hearing. Mr P M Vyas, learned Advocate has appeared for the appellant on his appointment in legal aid. Mr K C Shah, learned APP has appeared on behalf of the State. We have heard the learned Advocates for the parties, who have taken us through legal and factual aspects of the case including oral evidence and the judgment of the trial court.

5. As said above, the prosecution case before the trial court was that Police Inspector Mr Pathan received an information that a person was selling narcotic drug. He reduced the said information into writing and forwarded it to the superior officer. Raid was carried out and before personal search of the appellant was carried out, he was informed that he could be searched in presence of a Magistrate or a Gazetted Officer. The appellant declined to undertake that process and agreed to be searched in presence of the police officer only. On carrying out the search of the appellant, the above drug was found and it was seized by the said officer. Sample was collected and sent to the FSL and it was

confirmed that it was charas and, therefore, charge sheet was filed. So far as the evidence is concerned, prosecution has produced evidence of panch witness - PW 1, Hormoz Firoz Awari, Exh.6, who has clearly deposed that he was taken as a panch on the aforesaid information by Mr Pathan and that before personal search was carried out, the appellant was conveyed about his right of being searched in presence of a Gazetted Officer or a Magistrate. It is further stated by him that written intimation was also given to the appellant to that effect but the appellant agreed to be searched in presence of Mr Pathan. That on carrying out the search, the above drug was found from the person of the appellant which was seized by Mr Pathan and panchnama Exh. 7 was drawn by PW 2, Shri N A Pathan, Exh.14, the Police Inspector, who had carried out the search. PW 2 Shri Pathan has also stated the said fact and hence it is not necessary to repeat his evidence because his evidence is almost on par with the evidence of the panch witness. During the course of his oral evidence, he has produced the written information forwarded to the Dy.Superintendent of Police at Exh.15. The FIR can be gathered at Exh.16 wherein the entire fact has again been narrated. Exh.17 is a written intimation given to the appellant that he could be searched in the presence of a Magistrate or a Gazetted Officer which bears the thumb mark of the appellant. Exh. 18 is also a seizure memo which also bears thumb mark of the appellant. Exh.19 is an intimation in writing to the appellant about the grounds of his arrest. This evidence and the documents clearly show that the provisions contained in Section 50 of the said Act have been duly complied with.

6. Learned Advocate for the appellant has relied upon a decision of this Court in Criminal Appeal No.434/90 dated 1.10.1999 in the case of Himatbhai Pethabhai Vankar v. State of Gujarat. Division Bench of this Court has dealt with so many aspects of the case which were required to be dealt with by the said Bench in view of the disputed facts arising therein. Now so far as the provision contained in Section 50 is concerned, it cannot be seriously disputed that the provision is mandatory. As stated by the P.I. and the panchas the appellant was intimated that he would be searched in presence of a Gazetted Officer or a Magistrate. The said fact is supported by the written intimation referred to hereinabove. It is also found from the FIR and Panchnama that the said intimation was given to the appellant. Therefore, there was sufficient material before the trial court to hold that the provisions contained in section 50 of the said Act have been complied with. The trial court

was, therefore, justified in holding that there is no violation of section 50 of the said Act. This Court, while dealing with the above matter, had referred to a decision of State of Punjab v. Baldev Singh, reported in (1999) 6 SCC 172. In para 57 of the said judgment, it has been positively observed by the Hon'ble the Apex Court that the information to be conveyed to the appellant under section 50 of the said Act would not be necessarily in writing. However, in the present case, we find that there is sufficient material to show that the above intimation was conveyed to the appellant orally as well as in writing and the said fact is borne out from the oral as well as documentary evidence on record. Therefore, it cannot be said that the provisions contained in Section 50 of the said Act have not been complied with.

7. At the same time, in para 32 of the said decision, Hon'ble the Supreme Court has observed that the provisions contained in section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the Investigating Officer to ensure that search of the person concerned is conducted in the manner prescribed by section 50 by intimating him about the existence of his right that if he so desires, he shall be searched before a Gazetted Officer or a Magistrate. However, in a subsequent decision in the case of Joseph Fernandez v. State of Goa, reported in AIR 2000 SC 3502, the Hon'ble the Supreme Court has very clearly observed that it would be sufficient for the searching Officer to inform the person to e searched that "if you wish, you may be searched in presence of a Gazetted Officer or a Magistrate". It has also been observed that this is substantial compliance with the requirement of section 50 of the said Act. In above view of the matter and in view of the observations made by the Hon'ble the Supreme Court in the aforesaid decisions, it would not be open to the appellant to argue that the provision contained in section 50 of the Act has not been complied with in the present case.

8. The next contention raised on behalf of the appellant is that the search and seizure must take place in presence of a Magistrate or a Gazetted Officer. After all, section 50 of the Act does not speak that a search or seizure has to take place in presence of a Magistrate or a Gazetted Officer. Section 50 of the said Act does not require that all the search and seizure must take place positively in presence of a Gazetted Officer or a Magistrate. Therefore, we are not inclined to accept the aforesaid arguments advanced on behalf of the appellant

by Mr P M Vyas.

9. One more contention raised by M P M Vyas is that the panch witness was known to the police officers. For appreciating the said argument, we can turn to the evidence of the panch witness, who has deposed in his cross examination that he has acted as a panch witness in four to five cases. Now, it is not the case of the witness or of the appellant that the said panch witness has acted as a panch witness in the case in which Mr Pathan was the main officer. Therefore, simply because the witness had gone as Panch witness for four to five times during the entire span of his life, it would not mean that the panch witness is known to the police officers. This witness has also stated that he knows the police officers at Navsari and P.I. Ramani. Now in the present case, search was carried out by Mr Pathan and not by Mr Ramani. Moreover, it is not on record that Mr Pathan who carried out search also was known to the panch witness. Moreover, when the said witness says that he knows the police officers at Navsari, it does not mean that the police officers also know him. Close relations between the panch witness and the police officers have not been brought on record. On the contrary, a suggestion was made to the panch witness in cross examination that the panch witness was beaten by the police. This witness has denied the said suggestion. This would, on the contrary, show that the panch witness was not having any cordial relation with the police officers. It is also required to be considered that the informant Mr Pathan has very clearly stated in his evidence that at the relevant point of time, he was working as Police Inspector, State Narcotic Cell, CID (Crime), Gujarat State, Ahmedabad. This would again show that he was a Police Officer not connected with Navsari police station. Therefore, it cannot be inferred that Mr Pathan was also known to the panch witness. It shows that no relation between the raiding police and panch witness has been established. It is true that a suggestion was made to this witness that the co-panch witness was involved in 25 to 30 cases. However, this witness said that he does not know about the same. There is further material to show that the co-panch witness has close connection with the police or station. In that view of the matter, it would not be possible to hold that the panch witnesses were having close relation with the police officers.

10. It has then been contended by the learned Advocate for the appellant that the information received by the informant was not reduced into writing by him and

therefore, there is apparent violation of section 41 of the said Act. In para 2 of his evidence, Mr Pathan, at Exh.14, has clearly stated that the information received by him was not only reduced into writing but it was also conveyed to the Dy. Superintendent of Police. His evidence is supported by the written intimation at Exh.15. It is further noticed from FIR of the informant Exh.16 wherein it has been clearly stated that the said information was reduced into writing and it was immediately forwarded to the Dy.Superintendent of Police Mr K T Modi. In that view of the matter, it cannot be said that the provision contained in section 41 was not complied with by Mr Pathan. No other point was raised and canvassed on behalf of the appellant by Mr P M Vyas, learned Advocate for the appellant. In above view of the matter, considering the evidence on record and considering the observations made by the trial court, which had occasion to record demeanor of the witnesses while recording the evidence, we do not find that any illegality has been committed by the trial court in convicting the appellant. We also do not find any infirmity in the judgment of the trial court. The trial court has not committed any error in appreciating the evidence before it. Therefore, the judgment of the trial court is not found to be wrong or illegal. The trial court has not ignored any legal or factual aspect of the case. Therefore, there is no error committed by the trial court in convicting the appellant. In that view of the matter, there is no merit in the present appeal and consequently, it deserves to be dismissed.

11. For the foregoing reasons, this appeal is dismissed. The judgment and conviction order recorded by the trial court are confirmed.

23.4.2003 [D P Buch, J.]

[H H Mehta, J.]
msp